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No. 06-1681

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IN THE

Supreme Court of the United States

HYNIX SEMICONDUCTOR, INC. and
HYNIX SEMICONDUCTOR AMERICA, INC.,

Petitioners,

v.

RAMBUS INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent Rambus Inc. has no parent corporation, and no single publicly held company owns 10% or more of its stock.

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INTRODUCTION

Despite its extensive discussion of federal arbitration policy, the Petition seeks review of a state-law contract interpretation issue decided by a California intermediate appellate court. The California Court of Appeal held, based on provisions of an arbitration agreement that it found to be unambiguous, that the parties intended to incorporate California Code of Civil Procedure § 1281.2(c), a California statute giving trial courts discretion to deal with practical problems that arise in multi-party disputes where the parties have not all agreed to the same arbitration arrangements. Applying that statute, as the parties had agreed, the Court held that Plaintiff and Respondent Rambus Inc. ("Rambus") was not required to try its state antitrust claims alleging a single antitrust conspiracy among all defendants in three separate forums.[1] In the state court, Hynix itself insisted that the sole issue was the parties' intent, a matter of state law contract interpretation. In its opening brief in the Court of Appeal, Hynix stated that "the issue on appeal is whether the trial court erred in concluding that the parties to the 1994 Agreement *intended* that the California rules of arbitration apply to the dispute. . . ." In its reply brief, Hynix put the point even more emphatically, "the road to resolution of

1. The three forums would be an arbitration for Petitioner and Defendant Hynix, a separate arbitration for Defendant Samsung, and a separate jury trial for Defendant Micron (with whom Rambus has no arbitration agreement). Throughout, "Hynix" refers to Petitioners and Defendants Hynix Semiconductor, Inc. ("HSI") and Hynix Semiconductor America, Inc. ("HSA"). "Samsung" refers to Defendants and Cross-Claimants Samsung Electronics Co., Ltd. ("SEC"); Samsung Electronics America, Inc. ("SEA") and Samsung Semiconductor, Inc. ("SSI"). "Micron" refers to Defendants and Cross-Claimants Micron Technology, Inc. and Micron Semiconductor Products, Inc.

Hynix's appeal *begins and ends with the parties' contractual intent.*"[2] That is correct, and the Petition should be denied on that basis alone.

The "Question Presented" by Hynix was not raised or decided below. Hynix states the question as "whether, in light of the [Federal Arbitration Act (FAA)], generic choice-of-law clauses incorporate state arbitration rules that limit or prevent arbitration." Pet. 8. But Hynix raised no such issue in the California Court of Appeal, arguing only that the parties did not *intend* to incorporate state law — that the appeal "begins and ends with the parties' contractual intent." Hynix now argues that this Court's decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), precludes a state court from interpreting an arbitration agreement as the California court did here. But Hynix did not advance this argument below — indeed, it did not even mention *Mastrobuono* in its briefs.

Even if the argument Hynix now makes had been raised below, it would not warrant this Court's review of this case. Hynix claims that there is a conflict arising from a supposed "tension" between this Court's decisions in *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468 (1989), and *Mastrobuono*. But the unpublished disposition below is entirely consistent with the reasoning in both of these opinions.

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2. In an effort to avoid the consequences of its prior argument, Hynix represents to this Court that the California Court of Appeal reached its conclusion that it should apply § 1281.2(c) "*not* by deciding that the parties had expressly intended to choose California procedures." Pet. 15 (emphasis added). Not so. The Court of Appeal held that "any consideration of the contract as a whole results in an interpretation that *the parties expressly intended California law to apply*." App. 13a-14a (emphasis added).

In *Volt*, as here, a California Court of Appeal found that a choice-of-law clause in an arbitration agreement incorporated the California rules of arbitration, including the statute at issue here, California Code of Civil Procedure § 1281.2(c). 489 U.S. at 472. This Court deferred to the state court's interpretation of the contract and held that § 1281.2(c) neither offended federal arbitration policy nor was preempted by the FAA. *Id.* at 474-479. Noting that "the FAA itself contains no provision designed to deal with the special practical problems that arise in multiparty contractual disputes when some or all of the contracts at issue include agreements to arbitrate," the Court found that § 1281.2(c) is "manifestly designed to encourage resort to the arbitral process" and "generally foster(s) the federal policy favoring arbitration." 489 U.S. at 476 & n.5. The Court emphasized that, "[w]here, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA. . . ." *Id.* at 479.

Hynix asserts that, "[p]rocedurally, this case is identical to the decision this Court reviewed in *Volt*." Pet. 21-22. That is true, but only in a sense that underscores why review is unwarranted here. In both cases, the state appellate courts decided the meaning of the contract under state law principles; here, as in *Volt*, this Court must defer to that decision. There are, however, two crucial procedural differences: (1) in *Volt*, petitioner had *raised* in state court the question whether application of § 1281.2(c) offends federal law, 489 U.S. at 472; and, (2) in *Volt*, this Court had *not yet decided* that question. Neither is true here: Hynix did not raise the question below, and the issue has already been decided by this Court in *Volt*.

The disposition below is also consistent with *Mastrobuono*. There, this Court, reviewing a decision by a lower federal court, applied the long settled principle that, when a court finds as a matter of state law contract interpretation that an agreement subject to the FAA is ambiguous, the ambiguity should be resolved in favor of arbitration. 514 U.S. at 62. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 n.9 (2002) ("In *Mastrobuono*, we reiterated that clear contractual language governs our interpretation of arbitration agreements, but because the choice-of-law provision in that case was ambiguous, we read the agreement to favor arbitration under the FAA rules.") The decision below is thus wholly consistent with both *Mastrobuono*, which addresses how federal courts should resolve an ambiguity in contracts subject to the FAA, and *Volt*, which holds that a state court's interpretation of a choice-of-law provision as incorporating California Code of Civil Procedure § 1281.2(c) must be enforced.

Finally, the supposed "conflict" asserted by Hynix arises from the fact that different federal and state courts have made different findings of contractual intent—an issue of state law—as they interpreted choice-of-law clauses in particular arbitration agreements involving potential incorporation of varying state arbitration rules (some displacing an express federal rule, others not). Even assuming a true conflict existed, it would not be a matter that needs to or can be resolved in this case, in which a state court determined the parties' intent based on contractual provisions it found to be plain and unambiguous, and where this Court has already found that the state arbitration rule in question fills a gap in federal law in a way that furthers federal policy.

For all the foregoing reasons, the Petition should be denied.

STATEMENT OF THE CASE

Rambus is a leading designer and licensor of dynamic random access memory ("DRAM") interface technology. Hynix and its co-defendants Samsung and Micron are manufacturers of DRAM and wield substantial power in the global DRAM market.

Rambus alleges that defendants combined and conspired, in violation of California law, to restrict the production of, and raise the price for, Rambus DRAM ("RDRAM") chips. The Complaint asserts the same four causes of action against each defendant: (1) conspiracy to restrict output and fix prices in violation of the Cartwright Act, Cal. Bus. & Prof. Code §§ 16720 *et seq.*; (2) conspiracy to monopolize in violation of the Cartwright Act; (3) intentional interference with prospective economic advantage; and (4) unfair competition, Cal. Bus. & Prof. Code §§ 17200 *et seq.*

The choice-of-law and arbitration provisions in Rambus's agreement with Hynix provide in full:

> SECTION 9
>
> *GOVERNING LAW; ARBITRATION*
>
> 9.1. *Governing Law.* This Agreement shall be governed by and interpreted in accordance with the laws of the State of California, U.S.A., without reference to conflict of laws principles.
>
> 9.2. *Arbitration.* All disputes and differences between [Hynix] and Rambus arising out of or in connection with this Agreement shall be settled

> amicably through negotiations. In case such dispute or difference cannot be settled by such means, it shall be finally settled by binding arbitration in English. If action is initiated by [Hynix], such arbitration shall take place in San Francisco, California under the Commercial Rules of Arbitration of the American Arbitration Association by one arbitrator appointed in accordance with said rules. If action is initiated by Rambus, such arbitration shall take place in Seoul, Korea pursuant to the U.S.-Korean Commercial Arbitration Agreement of December 1, 1974 by which each party is bound. The arbitrator shall apply California law to the merits of any dispute or claim, without reference to rules of conflicts of law or arbitration. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Notwithstanding the foregoing, the parties may apply to any court of competent jurisdiction for injunctive relief without breach of this arbitration provision.

The corresponding provisions in Rambus's agreement with Samsung are similar, although they provide for arbitration by three arbitrators (instead of one) under the Rules of Conciliation and Arbitration of the International Chamber of Commerce (instead of the U.S.-Korean Commercial Arbitration Agreement). Thus, any arbitration with Samsung would be held in a different forum and under different rules than any arbitration with Hynix. It is undisputed that no arbitration agreement applies to Rambus's claims against Micron.

On May 23, 2005, Hynix filed its motion to compel arbitration, which the trial court denied. App. 38a. The trial

court found that there was "a valid and enforceable arbitration clause" in the Agreement that applied to all of Rambus's causes of action as against Hynix. *Ibid.* But the trial court also found that "Sections 9.1 (choice of law clause) and 9.2 (arbitration clause) of the . . . Agreement must be read to render the California rules of arbitration [including California Code of Civil Procedure § 1281.2(c)] applicable to interpreting the . . . Agreement." App. 39a. Under those state law provisions, a court has discretion in certain circumstances to require that disputes be resolved in state court rather than in arbitration in order to avoid duplicative litigation and the risk of inconsistent results. The trial court exercised its discretion under section 1281.2(c) "to refuse to enforce an arbitration clause" because the specified circumstances existed. App. 39a-40a. The trial court explained that this action was not a case in which each claim against each defendant "rest[ed] on its own facts." App. 40a. Rather, "[h]ere, each claim is one of concerted action and concerted behavior. By parceling out the claims against one defendant for resolution in a forum where the other defendants may be unable or unwilling to participate, there is a high risk of inconsistent results." *Ibid.* Additionally, the trial court found that, "if the Hynix arbitration were to proceed in South Korea, and the remaining claims were tried in California, duplication of efforts would result because the same materials might have to be dealt with twice in the two different forums." *Ibid.*

The trial court denied Samsung's subsequent petition to compel arbitration for the same reasons, emphasizing that "the risk of inconsistent results and duplication of effort [was] greater, not less" because, "[a]lthough both [the Hynix and Samsung] arbitrations would be in Korea, they would be conducted in different forums under different rules" and thus

"the same materials might have to be dealt with...three times in three different forums. . . ." 1/3/06 Order ¶¶9-10.[3]

Hynix appealed, stating that there was a single issue on appeal: "whether the trial court erred in concluding that the parties to the 1994 Agreement *intended* that the California rules of arbitration apply to the dispute over whether Rambus's claims against Hynix should be arbitrated." Hynix Opening Brief 15 (emphasis added). In its reply brief, Hynix emphasized that "the road to resolution of Hynix's appeal begins and ends with the parties' contractual intent." Hynix Reply Brief 3. The California Court of Appeal resolved this purely state law question of contract interpretation by affirming in full the trial court's orders denying arbitration. Consistent with Hynix's framing of the issue on appeal, the court "examine[d] the language of the 1994 agreements to determine whether the parties intended to apply the FAA to the exclusion of California procedural law." App. 11a. The California court held that "any consideration of the contract as a whole[] results in an interpretation that *the parties expressly intended California law* to apply and there is no provision that expressly or even implicitly states that the FAA's procedural rules of arbitration apply." App. 13a-14a (emphasis added).

The Court of Appeal adhered closely to the California Supreme Court's decision in *Cronus Investments, Inc. v. Concierge Services*, 35 Cal. 4th 376 (2005), which held that a choice-of-law provision calling for an agreement to be "construed and enforced in accordance with and governed by the laws of the State of California" "incorporates

3. Samsung appealed to the California Court of Appeal and its appeal was consolidated with Hynix's. Samsung has neither filed a Petition for a Writ of Certiorari nor joined in Hynix's Petition.

California's rules of arbitration into the contract." *Id.* at 387. Acknowledging Hynix's contention that "ambiguities must be construed in favor of applying the FAA," the state court held that it need not resolve that issue because the parties' agreement "is not ambiguous." App. 16a n.9 (emphasis added); see also *id.* 12a ("We agree with the trial court's interpretation of the plain meaning of [the choice-of-law and arbitration] provisions.") (emphasis added). The California Supreme Court denied review.

REASONS FOR DENYING THE PETITION

1. The Disposition Below Was Based on Interpretation of a Contract Under State Law.

This Court has repeatedly held that the interpretation of private arbitration agreements is generally a matter of state law, which this Court does not sit to review. *First Options v. Kaplan*, 514 U.S. 938, 944 (1995); *Volt*, 489 U.S. at 474. Even when the FAA applies and a court therefore is to give "due regard . . . to the federal policy favoring arbitration," it does so "in applying general state-law principles of contract interpretation." *Volt*, 489 U.S. at 475-476. Here, the California Court of Appeal determined the parties' intent based upon California principles of contract interpretation. App. 11a-22a. Hynix itself repeatedly argued that the only question on appeal was the contractual intent of the parties. *See* Hynix Opening Brief 15 ("The issue on appeal is whether the trial court erred in concluding that the parties to the 1994 Agreement intended that California rules of arbitration apply. . . ."); Hynix Reply 3 ("the road to resolution of Hynix's appeal begins and ends with the parties' contractual intent"). The California Supreme Court summarily denied

review without reaching the merits of any issue. *See Trope v. Katz*, 11 Cal. 4th 274, 287 n.1 (1995) ("It has long been established in California that a denial of hearing is not an expression of the Supreme Court on the merits of the cause."). The Petition should therefore be denied as not raising any federal question.

2. The Question Presented Was Not Raised Below.

The "Question Presented" stated in the Petition is "[w]hether, in light of the Federal Arbitration Act's strong federal policy favoring arbitration, a generic choice-of-law clause in a contract providing for arbitration incorporates state arbitration rules that limit or prevent arbitration." Pet. i. Hynix argues repeatedly that this question arises from a tension between *Mastrobuono* and *Volt* and a resulting conflict among decisions of nine circuits and nine state courts, involving 21 decisions. Pet. 2, 8-15. It argues in this Court that *Mastrobuono* and numerous lower court decisions relying on *Mastrobuono* hold that a "generic" choice-of-law clause may not be interpreted as incorporating state arbitration rules. *See, e.g.*, Pet. 3, 9.[4] Tellingly, however, neither this Court's decision in *Mastrobuono* nor 20 of these 21 lower court decisions were so much as mentioned in Hynix's briefs to the California Court of Appeal.[5] Consistent with that fact, nowhere did Hynix argue, as it does now, that the California court was required by *Mastrobuono* to interpret the

4. As discussed below, such an interpretation of *Mastrobuono* is in any event wrong. *See infra* pp. 23-24.

5. The one other case, *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998), was mentioned only because it, like the disposition below, turned on a determination under California law whether the language of a particular choice-of-law clause incorporated California Code of Civil Procedure § 1281.2(c). *See infra* pp. 18-19.

parties' agreement as not incorporating § 1281.2(c). Nor did the California court address any such question. The California court did acknowledge the rule applied by this Court in *Mastrobuono* — that, if an agreement is ambiguous based on state law contract principles, that ambiguity should be resolved in favor of arbitration, in furtherance of the policy behind the FAA. App. 16a n.9. The state court ruled, however, that it need not resolve this issue because the meaning of the parties' agreement was not ambiguous. App. 16a n.9.

Because the Question Presented was neither raised in nor decided by the California Court of Appeal, this Court should deny review. *See Illinois v. Gates*, 462 U.S. 213, 218 (1983) ("it is only in exceptional cases, *and then only in cases coming from the federal courts*, that [this Court] considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below") (emphasis added); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) (declining jurisdiction where, although an issue was raised in the state court, it was not considered by that court).

3. The California Court of Appeal's Disposition Is Fully Supported by *Volt* and Is Consistent with *Mastrobuono*.

The California court's decision here is fully consistent with both *Volt* and *Mastrobuono*. For that additional reason, the decision does not present a suitable vehicle for addressing either any perceived tension between those two decisions or any perceived conflict among lower courts with respect to their interpretation. The decision below simply does not implicate any such tension or conflict.[6]

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6. The California Court of Appeal ordered that its opinion was not to be published in the official reports of the state. App. 2a. (Cont'd)

a. The Disposition is fully supported by *Volt*.

In *Volt*, the California Court of Appeal held that, by including a general choice-of-law clause in their arbitration agreement, the parties had incorporated the California rules of arbitration, including § 1281.2(c), into that agreement. 489 U.S. at 472. As this Court noted, the state court found that, by doing so, "the parties had agreed that arbitration would not proceed in situations which fell within the scope of [§ 1281.2(c)]." *Id.* at 475. This Court emphasized both that "the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review," *id.* at 474, and that "[the FAA] confers only the right to obtain an order directing that 'arbitration proceed *in the manner provided for in [the parties'] agreement*.' 9 U.S.C. § 4," 489 U.S. at 474-475 (emphasis and brackets in original). The Court held that the appellant in *Volt* therefore "had no [FAA-guaranteed right to compel arbitration] in the first place, because the parties' agreement did not require arbitration to proceed in this situation." *Id.* at 475.

In *Volt*, this Court squarely rejected the argument that the California court's interpretation of the parties' agreement as incorporating § 1281.2(c) somehow offended the federal policy favoring arbitration. The Court held that "[t]here is no federal policy favoring arbitration under a certain set of

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(Cont'd)

California Rule of Court 8.1115(a) provides that, except in circumstances not relevant here, "an opinion of a California Court of Appeal . . . that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action." Thus, in any event, the decision below does not create either a risk that other California courts will follow it or a conflict with any published opinion of another court, state or federal.

procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt*, 489 U.S. at 476.

> Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration — rules which are manifestly designed to encourage resort to the arbitral process — simply does not offend the rule of liberal construction set forth in [*Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)], nor does it offend any other policy embodied in the FAA.

Ibid. The Court further held that, even assuming the procedural provisions (§§ 3 and 4) of the FAA are applicable in state court proceedings (something this Court has never held), those provisions would not pre-empt application of § 1281.2(c) where the parties have agreed to incorporate that statute into their agreement. *Id.* at 477-479. "By permitting the courts to 'rigorously enforce' [agreements to abide by state rules of arbitration] according to their terms, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA." *Id.* at 479 (citation omitted); *accord Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 688 (1996) ("[In *Volt*], [w]e held that applying the state rule would not 'undermine the goals and policies of the FAA,' because the very purpose of the Act was to 'ensur[e] that private agreements to arbitrate are enforced according to their terms.'") (citations omitted).

Volt is dispositive here. The California Court of Appeal held that, by choosing California law to govern their contract, the parties incorporated California Code of Civil Procedure

§ 1281.2(c) into their arbitration agreement and "expressly intended California law to apply." App. 11a, 12a, 13a-14a, 21a-22a. Thus, as in *Volt*, the parties agreed that arbitration would not proceed in the circumstances described in § 1281.2(c). The California court found that such circumstances exist, and Hynix therefore has no right to compel arbitration under the FAA.

The California statute, as this Court held in *Volt*, furthers the FAA's policy of encouraging parties to enter arbitration agreements. *See* 489 U.S. at 476 n.5 ("California has taken the lead in fashioning a legislative response to [the multi-party] problem, by giving courts authority to consolidate or stay arbitration proceedings . . . in order to minimize the potential for contradictory judgments.") One way to encourage parties to enter into arbitration agreements is to create rules that deal with the significant practical difficulties that arise where, for reasons extrinsic to the arbitration agreement itself, arbitration would be inefficient or risk inconsistent results. If a party considering whether to enter an arbitration agreement believes that, by doing so, it may subject itself to litigating the same claims with multiple parties in different forums, with potentially inconsistent judgments, it is less likely to enter that agreement. Private parties — especially companies doing business with many others and in many jurisdictions — cannot be certain what disputes will arise and whether all the parties involved will have agreed to arbitrate among themselves. Section 1281.2(c) represents California's effort to deal with this problem, by allowing courts to stay or bar arbitration where a party is litigating the same dispute against multiple parties, some of whom have agreed to arbitrate and some of whom have not.

Volt involved a stay of arbitration pending litigation, whereas this case involves a court's declining to order arbitration in favor of resolving all the claims in a single court proceeding, but that difference should have no bearing on the outcome here.[7] The substantive policy underlying the FAA that favors arbitration does not mandate that state courts compel parties to arbitrate *every* dispute even when doing so would risk inconsistent results and cause inefficiency. By guarding against the inefficiencies and potential confusion inhering in duplicative proceedings, which would chill parties' willingness to enter into arbitration agreements in the first place, the discretion to deny arbitration under § 1281.2(c) thus furthers the federal policy of encouraging parties to enter arbitration agreements.

b. The Disposition Is Consistent with *Mastrobuono*.

The decision below is also fully consistent with this Court's decision in *Mastrobuono*. There, as the Court itself emphasized, this Court was reviewing a decision by a lower federal court, not a state court, and was therefore free,

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7. In *Volt*, this Court did not distinguish among the various options provided a trial court in § 1281.2(c) to deal with the "special practical problems" that arise in multiparty disputes when some or all of the contracts at issue include agreements to arbitrate, finding that "the California arbitration *rules* which the parties have incorporated into their contract generally foster the federal policy favoring arbitration." 489 U.S. at 476 n. 5 (emphasis added). Indeed, as Hynix concedes, "it is unclear that the distinction [] between a re-ordering of proceedings and a more substantial interference with arbitration [such as denial], is substantively meaningful." Pet. 18; *accord Volt*, 489 U.S. at 487 (Brennan, J., dissenting) ("Applying the California procedural rule, which stays arbitration while litigation of the same issue goes forward, means simply that the parties' dispute will be litigated rather than arbitrated.").

applying state law, to construe the parties' agreement in the first instance. 514 U.S. at 60 n.4. The Court found that Shearson Lehman's standard form agreement for customers to open a securities trading account was ambiguous as to whether punitive damages would be available in arbitration, as they would be in court. *Id.* at 59-62. Only after having found the agreement ambiguous under state law did the Court apply the principles that (1) ambiguities should, under the FAA, be resolved in favor of arbitration; (2) ambiguities should be resolved against the party that drafted the contract; and (3) a document should be read to give effect to all its provisions. *Id.* at 62-64. In light of all those principles, the Court found that the agreement should be construed to allow punitive damages. *Ibid.* The Court described and distinguished its prior decision in *Volt* without in any way questioning its continued validity. *See id.* at 57-58, 60 n.4. The decision below is fully consistent with *Mastrobuono* because here, as in *Volt*, the state court held that the parties' choice-of-law and arbitration agreements plainly and unambiguously incorporated California rules of arbitration, including § 1281.2(c).

This Court has itself explained that *Mastrobuono* and *Volt* are not inconsistent but reflect different approaches depending on whether the issue arises in state or federal court, *see Mastrobuono*, 514 U.S. at 60 n.4, and whether the agreement in question is, as a matter of state law, clear or ambiguous. In *Waffle House*, the Court explained its decision in *Volt* and then stated, "Our decision in [*Mastrobuono*] is not inconsistent with this position." 534 U.S. at 294 n.9. "In *Mastrobuono*, we reiterated that clear contractual language governs our interpretation of arbitration agreements, but because the choice-of-law provision in that case was ambiguous, we read the agreement to favor arbitration under

the FAA rules." *Ibid.* Where the agreement is clear, "*Volt* and *Mastrobuono* both direct courts to respect the terms of the agreement without regard to the federal policy favoring arbitration." *Ibid.* Here, the state court held that the agreement plainly and unambiguously incorporated § 1281.2(c); under *Volt* and *Waffle House*, that agreement must be enforced. *Mastrobuono* does not suggest otherwise.

4. This Case Does Not Involve Any Conflict Among the Circuit and State Courts.

Hynix contends that "[t]he federal and state courts are in conflict over whether, in light of the FAA, generic choice-of-law clauses incorporate state arbitration rules that limit or prevent arbitration," and it claims the conflict arises from an asserted "tension" between *Volt* and *Mastrobuono*. Pet. 8. Federal and state courts *have* reached varying conclusions in interpreting choice-of-law clauses and determining whether they incorporate state rules of arbitration. But Hynix ignores both the significant difference between federal and state cases and the reasons why different courts have reached different conclusions.

The interpretation of contractual language is at bottom a matter of state law, but, where the state courts have not spoken, a federal court must decide how it should interpret a choice-of-law clause in an arbitration agreement in the first instance. *Mastrobuono* addressed that question, although the Court there resolved it only with respect to the particular facts of that case. *See Roadway Package Sys. v. Kayser*, 257 F.3d 287, 297 (3d Cir. 2001) ("The Court [in *Mastrobuono*] was careful to make clear that it was rendering no holding as to the meaning of the [choice-of-law] clause itself."). A state court decision might present this Court with two somewhat

different questions (if those questions were properly raised): (i) whether the court correctly applied the federal policy in favor of arbitration to an ambiguous choice-of-law provision; and (ii) whether the state court's interpretation of a choice-of-law clause as unambiguously incorporating state arbitration rules offends the federal policy embodied in the FAA. The first question does not arise here, because the state court found that the parties' agreement was unambiguous. The second question has already been answered, with respect to § 1281.2(c) itself, by this Court in *Volt*. 489 U.S. at 476 ("Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration . . . simply does not offend the rule of liberal construction set forth in *Moses H. Cone*, nor does it offend any other policy embodied in the FAA.")

Hynix has also misstated the reasons for differing outcomes in the lower courts. The two principal circuit court decisions relied on by Hynix in the Petition — *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998), and *Security Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322 (2d Cir. 2004) — reveal that the purported "conflict" arose from an issue of state law that has since been resolved by the California Supreme Court. Hynix cites *Wolsey* as the prime example of a decision holding that a "generic choice-of-law provision" does not incorporate state arbitration rules and asserts that *Wolsey* "conflicts directly with the decision below." Pet. 9. But the court in *Wolsey* simply failed to anticipate correctly how the highest state court would rule. The Ninth Circuit, applying California contract law, 144 F.3d at 1209-1211, held that a choice-of-law clause that provided that the agreement "shall be interpreted and construed under the laws of the State of California" did not incorporate California's arbitration rules, including specifically

§ 1281.2(c), *id.* at 1209-1213, a ruling the California Supreme Court has since rejected, as explained below.

Hynix then cites *Security Ins. Co. of Hartford* as its lead example of a contrasting decision holding "that generic choice-of-law clauses incorporate state rules that restrict or prevent arbitration." Pet. 13. In that case, the Second Circuit, also applying California law, predicted that the California Supreme Court would rule that a choice-of-law clause providing that "[t]his Agreement shall be governed by and construed according to the laws of the state of California" does "incorporate the state's procedural rules for arbitration." 360 F.3d at 328-329. *See also id.* at 327 n.4 (declining to follow *Wolsey* because "[t]he Ninth Circuit did not predict how the California Supreme Court would rule on the question of state law").

The California Supreme Court has resolved the "conflict" between *Wolsey* and *Security Ins. Co. of Hartford* on which the Petition is premised. In *Cronus*, the court held that a choice-of-law clause providing that an agreement "shall be construed and enforced in accordance with and governed by the laws of the State of California" "incorporates California's rules of arbitration into the contract." *Cronus Investments, Inc.*, 35 Cal. 4th at 387. The California Court of Appeal here, of course, followed *Cronus*. App. 15a-22a. If and when a similar issue arises again in a federal court, that court should and presumably will follow the decision of the highest court in California.[8]

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8. Another decision cited by Hynix, *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266 (9th Cir. 2002), followed *Wolsey* before *Cronus* was decided. *Id.* at 1269-1270.

The "conflict" among the other cases cited by Hynix similarly arose from the courts' differing conclusions about the parties' contractual intent, viewed in light of the various state arbitration rules at issue. Indeed, Hynix acknowledges this in the Petition. *See* Pet. 16 (arguing that "the lower courts have simply interpreted the same basic contractual language differently"). The federal court decisions that find no incorporation of a state rule do so because they find that the parties' agreements are ambiguous — that the evidence of their intent to incorporate state law is not sufficiently clear — and that such ambiguity should be resolved in favor of a federal rule that addresses the same issue as the competing state rule. *See, e.g.*, *Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 29 (1st Cir. 2005), *cert. denied*, 547 U.S. 1071 (2006) (evidence "insufficient to indicate the parties' intent to contract for the application of state law [in place of the 'extremely limited judicial review contemplated by the FAA']"; *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 592-595 (1st Cir. 1996) (evidence not sufficiently clear that the parties intended to displace the federal rule that the NASD time bar is to be decided by the arbitrator with a state rule to the contrary); *Roadway Package Sys.*, 257 F.3d at 295 ("RPS and Kayser have expressed no clear intent as to whether the [court] should have applied federal or state [judicial review] standards"); *Porter Hayden Co. v. Century Indem. Co.*, 136 F.3d 380, 383 (4th Cir. 1998) (no "unequivocal expression of the parties' intent to commit adjudication of timeliness defenses to the court, rather than to an arbitrator"); *Acton Indus. v. United States Fid. & Guar. Co.*, 358 F.3d 337, 343 (5th Cir. 2004) (no "clear intent to depart from the FAA's [judicial review] standard"); *Ferro Corp. v. Garrison Indus.*, 142 F.3d 926, 937 (6th Cir. 1998) ("no indication that the parties intended to incorporate Ohio law to determine that [contrary to the federal rule] the issue of fraudulent

inducement should be adjudicated in a judicial forum"); *Jacada, Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 711 (6th Cir.), *cert. denied*, 546 U.S. 1031 (2005) (evidence did not "unequivocally" show an intent to displace the federal standard of judicial review); *UHC Mgmt. Co. v. Computer Sciences Corp.*, 148 F.3d 992, 997 (8th Cir. 1998) (holding that evidence did not show clear intent to displace express federal standard of judicial review with state standard, where choice-of-law provision provided that state law must yield "whenever preempted by federal law").[9]

State courts, speaking with authority to the state-law contract interpretation issue, have sometimes reached parallel conclusions. *See, e.g., Levine v. Advest*, 244 Conn. 732, 755, 714 A.2d 649 (1998) ("we conclude that the language of the arbitration portion of the parties' agreement creates an ambiguity . . . as to whether the parties intended the choice of law portion of the agreement to incorporate [a state law rule permitting timeliness defenses to be raised in court]"); *L & L Kempwood Assocs L.P. v. Omega Builders, Inc.*, 9 S.W.3d 125, 126-128 (Tex. 1999) (choice-of-law clause calling for "the law of the place where the Project is located" did not sufficiently evidence intent to displace federal rule that sufficiency of notice is an arbitrable issue, because "Houston . . . is subject to federal law as well as Texas law"); *Autonation Financial Services Corp. v. Arain*, 264 Ga. App.755, 756, 592 S.E.2d 96, 98 (Ga. 2003) ("the language of the arbitration clause makes clear the parties' intention that it is governed by the FAA").

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9. Several of these cases addressed the question whether parties may, by contract, require a federal court to review an arbitration agreement under a standard different from that provided expressly by the FAA (*see* 9 U.S.C. §§ 10, 11), a question as to which this Court recently granted a writ of certiorari. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, No. 06-989.

The cases relied upon by Hynix in fact confirm the very legal principles that underlie *Volt*, *Mastrobuono*, and the disposition below: (1) the parties to an arbitration agreement may, consistent with federal law, agree that state rather than federal arbitration rules will govern their dispute, *e.g.*, *Wolsey*, 144 F.3d at 1209 ("parties are free to enter into contracts providing for arbitration under rules established by state law rather than under rules established by the FAA"); *Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d at 31 ("We agree with the other circuits that have concluded that the parties can by contract displace the FAA standard of review. . . ."); *Roadway Package System, Inc. v. Kayser*, 257 F.3d at 288 ("the FAA permits parties to contract for vacatur standards other than the ones provided in the FAA"); (2) whether the parties have incorporated state arbitration rules into their agreement depends upon a finding with respect to the parties' intent, *e.g.*, *PaineWebber Inc. v. Elahi*, 87 F.3d at 593 ("the question is whether the parties *intended*, through their general choice of New York law, to adopt for themselves the New York caselaw requiring that courts, not arbitrators, decide the time bar") (emphasis in original); *Ferro Corp. v. Garrison Industries, Inc.*, 142 F.3d at 931 ("the issue of fraudulent inducement of the entire contract is an issue to be resolved by the arbitration process, in the absence of evidence that the contracting parties intended to withhold the issue from arbitration"); *Jacada (Europe), Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d at 710 ("we must interpret the parties' contract and then decide, as a matter of law, whether the choice-of-law provision in that contract is intended to apply Michigan's standard of review for arbitral awards"); and (3) the question of intent is one of state contract law, consistent with this Court's deference to the decision of the California court in *Volt* with respect to the question of the

parties' intent, *see, e.g.*, *Wolsey*, 144 F.3d at 1212 (distinguishing *Volt* because "the *Volt* Court [] declined to review a state court's interpretation of a private contract"); *Puerto Rico Tel. Co.*, 427 F.3d at 28 (this Court "deferr[ed] to the state court's intepretation of the contract"); *PaineWebber Inc. v. Elahi*, 87 F.3d at 594 n.5 (distinguishing *Volt* because this Court "deferred to the California court's finding under state contract law").

Here, the California Court of Appeal found, as a matter of state law contract interpretation, that the plain and unambiguous intent of the parties was to incorporate California arbitration rules, including Code of Civil Procedure § 1281.2(c). As this Court emphasized in *Volt*, the FAA contains no provision comparable to § 1281.2(c) that is "designed to deal with the special practical problems that arise in multiparty disputes when some or all of the contracts at issue include agreements to arbitrate." 489 U.S. at 476 n.5. Thus, in this case — in contrast to those relied upon by Hynix — the court below found that the parties' intended to incorporate a state rule that, rather than displacing an express federal rule, fills a gap in federal law in a way that "generally foster(s) the federal policy favoring arbitration." *Ibid.*

To the extent that one or more of the circuit court opinions imply that *Mastrobuono* adopted or supports the adoption of a *federal* common law rule of contract interpretation, under which a generic choice-of-law clause may never — regardless of the context and the type of state rule involved, and regardless of otherwise controlling state law principles — support a finding that the contracting parties intended to incorporate a state arbitration rule, *see, e.g.*, *Roadway Package System*, 257 F.3d at 297, that is both wrong

and inconsistent with the principles that (i) the issue of contractual intent is a matter of state law and (ii) federal arbitration law requires only that the intent of the parties be enforced. As noted above, in *Mastrobuono*, this Court, applying state law rules of contract interpretation, determined the particular choice-of-law clause before it to be ambiguous, in light of other express provisions of the contract, and then harmonized the provisions, construing them against the drafter and in favor of arbitration. 514 U.S. at 58-64. Those courts that suggest that a strict federal rule arises from *Mastrobuono* have simply misread the decision and skipped over the necessary step of deciding whether, under state law, a choice-of-law clause is ambiguous. In any event, both because this case arose in state court and because such an argument based on *Mastrobuono* was not raised below by Hynix, this case is not an appropriate vehicle to address the question.

CONCLUSION

In sum, the Petition presents no question worthy of review by this Court. The Petition should be denied.

Respectfully submitted,

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